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No. 97-208

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ACADEMY OF SCIENCES

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, PSYCHOLOGISTS FOR THE ETHICAL TREATMENT OF ANIMALS, AND ASSOCIATION OF VETERINARIANS FOR ANIMAL RIGHTS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "Guide Revision Committee," which was established to provide the National Institutes of Health, the United States Department of Agriculture, and other federal agencies with recommendations regarding the care and treatment of animals used in research, and which has operated under the auspices of the National Academy of Sciences, has been "utilized" as a federal advisory committee, within the meaning of the Federal Advisory Committee Act, 5 U.S.C. App. II § 3(2).

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Respondents Animal Legal Defense Fund, Psychologists for the Ethical Treatment of Animals, and Association of Veterinarians for Animal Rights oppose the petition for a writ of certiorari filed by the National Academy of Sciences ("NAS"). NAS's petition does not set forth all of the facts pertinent to the Court's consideration of NAS's petition. Accordingly, respondents will first set forth their counterstatement of the case and then explain why the Court should not grant review.[1]

COUNTERSTATEMENT

The specific issue resolved by the Court of Appeals was whether the government's use of a federally-funded committee established to provide the National Institutes of Health ("NIH") and other federal agencies with recommendations regarding the care and treatment of animals used in research, and which operated under the auspices of NAS, is subject to the public accountability requirements of the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"). In this Court's only ruling concerning FACA, the Court determined that Congress added the word "utilized" to the Act's definition of an "advisory committee" in order to "clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups *formed indirectly by quasi-public organizations such as the National Academy of Sciences* 'for' public agencies as well as 'by' such agencies themselves." *Public Citizen v. Department of Justice*, 491 U.S. 440, 462 (1989) (emphasis added). The Court of Appeals faithfully applied this Court's definition of

[1] Respondents, which were plaintiffs in the district court and appellants in the D.C. Circuit, are three organizations consisting of lawyers and law students, veterinarians, and psychologists concerned with the humane treatment of animals in research, all of which have sought, and been denied, access to the documents and meetings of the advisory committee at issue.

"utilized" committees to conclude that the advisory arrangement here is subject to FACA.

1. FACA's Requirements

Congress passed FACA in 1972 to regulate the "growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers of the Federal Government.' " *Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 902-03 (D.C. Cir. 1993), quoting 5 U.S.C. App. II § 2(a). The Act defines an "advisory committee" to mean:

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . (C) *established or utilized* by one or more agencies, *in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government*. . . .

5 U.S.C. App. II § 3(2) (emphasis added).

FACA requires that committees hold their meetings in public except for those closed or partially closed pursuant to specified exemptions, 5 U.S.C. App. II § 10(a)(1), that they keep minutes of each meeting, *see id.* at § 10(c), and that records not exempt under the provisions of the Freedom of Information Act, 5 U.S.C. § 552, be made available to the public. 5 U.S.C. App. II § 10(b). As summarized in the President's most recent published report to Congress on implementation of FACA:

> These provisions are designed to ensure that the ebb and flow of information to and from an advisory committee is maximized, and that committees are accountable to the public, two of the underlying rationales of FACA.

Twenty-Fourth Annual Report of the President on Federal Advisory Committees 1 (Fiscal Year 1995) (''President's FACA Report'').

Contrary to NAS's characterization, FACA does not mandate that the federal government ''control[]'' the work product of advisory committees subject to the statute. NAS Petition (''Pet.'') at 21. On the contrary, Congress required that agencies seeking advice should *not* ''inappropriately influence[]'' advisory committees but, rather, that any recommendations should be the ''result of the advisory committee's *independent* judgment.'' 5 U.S.C. App. II § 5(b)(3) (emphasis added).

2. This Court's Ruling in *Public Citizen*

In *Public Citizen*, this Court rejected the argument that the American Bar Association's Standing Committee on Federal Judiciary, which provides recommendations on judicial nominees to the Department of Justice, is ''utilized'' as an advisory committee. In an effort to avoid ''formidable constitutional difficulties'' that would be entailed if FACA were applied so as to interfere with the President's power to nominate federal judges, 491 U.S. at 466, the Court declined to adopt a ''straightforward reading'' of the statutory language. *Id.* at 453. Instead, the Court embarked on a detailed ''[c]onsideration of FACA's purposes and origins'' and paid ''[c]lose attention to FACA's history'' to ''ascertain the intended scope of the term 'utilize.''' *Id.* at 455, 456.[2]

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[2] The Court's analysis of the legislative history was based heavily on an *amicus* brief filed by several organizations in support of the government's position. *See* Brief of People for the American Way Action Fund *et al.*, *Public Citizen and Washington Legal Foundation v. Department of Justice*, Nos. 88-249, 88-494 (U.S. March 11, 1989).

This "careful review" of the Act's history, *id.* at 464, led the Court to conclude that "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals . . .." *Id.* at 453. In conducting its review of the legislative history, the Court focused on a 1970 House Report "which instigated the legislative efforts that culminated in FACA." 491 U.S. at 460.

That Report "complained that committees 'utilized' by an agency (as opposed to those established directly by an agency) rarely complied with the requirements of Executive Order 11007," a pre-FACA Order which regulated government advisory committees. *Id.*, citing H. Rep. No. 1731, 91st Cong., 2nd Sess. 15 (1970) (hereafter "1970 House Report"). As the Court observed, the House "Report's *paradigmatic example* of a committee 'utilized' by an agency for purposes of Executive Order 11007" — and which Congress therefore intended to ensure *was* covered by FACA — "*was an advisory committee established by a quasi-public organization in receipt of public funds, such as the National Academy of Sciences.*" 491 U.S. at 460 (emphasis added).

Based on these and similar statements, this Court reasoned that the phrase "or utilized" was added to FACA's definition of advisory committee "to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, *encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves.*" *Id.* at 462 (emphasis added). This review of FACA's history was indispensable to the Court's holding that the ABA committee was not being "utilized" by the Justice Department because, in sharp contrast to NAS committees, it was not "formed by . . . some *semi-private entity the Federal Government helped bring into being*," such as NAS.

Id. at 463 (emphasis added).

3. NAS's Status As A "Quasi-Public" Organization

As accurately labeled by this Court in *Public Citizen*, NAS is the "paradigmatic example" of a "*quasi*-public" or "*semi*-private entity the Federal Government helped bring into being" for the precise purpose of furnishing federal agencies with advice. 491 U.S. at 460, 462, 463 (emphasis added). Indeed, NAS was created by a Congressional charter, which provides that the "academy *shall, whenever called upon by any department of the Government,* investigate, examine, experiment, and *report upon any subject of science or art* . . .." 36 U.S.C. § 253 (emphasis added). Congress further provided that the "academy shall receive no compensation whatever for any services to the Government in the United States," but that the "actual expense of such investigations, examinations," and reports are "to be paid from appropriations . . .." *Id.* In other words, Congress has *required* that NAS furnish advice to the government upon request, and that the federal government pay for that advice.

While NAS now insists that it is *not* a "quasi-public" entity with a special status distinct from that of purely private organizations, Pet. at 17, this assertion is completely at odds with NAS's *own* longstanding description of itself, as well with its argument to this Court concerning its unique role in advising the federal government. Thus, in its own publications, the Academy has declared that it "has a *mandate that requires it to advise the federal government* on scientific and technical matters." NAS, *Report Review: Guidelines for Committees and Staff* 1. Court of Appeals Appendix ("C.A. App.") 188 (emphasis added).

In addition, NAS has stated that it has a "a *special*

relationship with the U.S. government because of its congressional charter and its *long history of support to the government as a quasi-independent ally.*" NAS, *The Policy Partnership With the U.S. Government* 17 (emphasis added) (C.A. App. 367). As the Academy has also observed, because "NAS was created by the federal government to be an adviser on scienfic and technological matters," it is not surprising that the "great majority of the studies carried out by the Academy complex are at the request of government agencies," and "usually are funded out of appropriations made available to federal agencies." NAS, *Questions and Answers About the National Academy of Sciences* 1. C.A. App. 541.

NAS has further explained that the National Research Council ("NRC") is the "main operating arm of the Academ[y] in conducting policy and technical studies for the federal government." C.A. App. 358. The NRC's "basic mission" is to "provide most of the services to governmental agencies and the Congress that are undertaken by the National Academy of Sciences" in its "role as adviser[] to the federal government." C.A. App. 549. The Research Council "does this primarily through its committee structure, calling upon a wide cross section of the nation's leading scientists" to serve on expert committees which advise federal agencies. *Id.*

The NRC, which was organized by NAS in 1916 "at the request of the President," has been the direct subject of several Executive Orders delineating its functions and activities. *See* E.O. 12832 (1993) (C.A. App. 264). In January 1993 — six months before the committee at issue in this case was formed — President Bush signed Executive Order 12832, which delineates what the functions of the NRC "shall be" and emphasizes that the "congressional charter of [NAS] charges it, *upon call from any U.S. Government Department*, to investigate, examine, experiment, and report upon any sub-

ject of science or art . . . .'' *Id.* (emphasis added).

NAS's prior assessment of itself as a ''quasi-independent'' advisor to the federal government, C.A. App. 367, is confirmed by its petition for certiorari. While criticizing *Public Citizen's* use of the terms ''quasi-public'' or ''semi-private'' to describe NAS, the Academy's petition simply reinforces those descriptions by stressing the ''continuing *need*'' of the Executive Branch to ''turn to NAS for expert advice'' — a need, according to the Academy, that ''*cannot* adequately be filled by any other identifiable source.'' Pet. at 21-22 (emphasis added).

4. The NAS Advisory Committee At Issue

a. As the Court of Appeals ruled, the intimate, longstanding advisory relationship at issue in this case is the quintessential example of an advisory committee ''formed indirectly by'' the ''National Academy of Sciences 'for' public agencies,'' at taxpayer expense. *Public Citizen*, 491 U.S. at 462. Hence, as the court below suggested, if *this* advisory arrangement is not covered by FACA, then there is no such creature as a ''utilized'' advisory committee and that statutory term is completely meaningless.

The federal defendants have legal duties to ensure that laboratory animals used for research purposes are treated in a proper and humane fashion. For example, the Health Research Extension Act, 42 U.S.C. § 289d, mandates that the Department of Health and Human Services (''HHS''), acting through the Director of NIH, establish guidelines for the ''proper care of animals to be used in biomedical and behavioral research'' and the ''proper treatment of animals while being used in such research.'' *Id.*

These guidelines are critical because recipients of federal

research monies must comply with them as a condition of obtaining federal funding. *Id.* The Department of Agriculture is also required by the Animal Welfare Act to develop standards for the humane care and treatment of animals used in research, *see* 7 U.S.C. § 2143(a), including, for example, the assurance of a "physical environment adequate to promote the psychological well-being of primates." *Id.* at § 2143(a)(2)(B).

b. For over four decades, committees of NAS/NRC have produced, for the federal government, the *Guide for the Care and Use of Laboratory Animals* (the "Guide"), which, as the title suggests, sets forth detailed advice and recommendations for the treatment of animals used in research. As explained by an NIH official, the Guide is widely regarded as the "most important single document used by Federal agencies with respect" to the care of research animals. C.A. App. 630.

For example, HHS "*requires* institutions who receive funding from NIH to use the Guide to develop and implement programs for activities involving animals." C.A. App. 813, citing Public Health Service Policy on Humane Care and Use of Laboratory Animals, 48 C.F.R. § 380.205. Indeed, the regulations specifically define the "Guide" as the "1985 Edition" — the version that preceded the one at issue — "*or succeeding revised editions*," 48 C.F.R. § 380.202(e) (emphasis added), so that as soon as the Guide is revised, the updated version of the recommendations is ***automatically incorporated into federal regulatory policy*** without any independent agency review of its content.

Even more sweepingly, an interagency committee consisting of representatives of all federal agencies that use animals in research — known as the Interagency Research Animal Committee — has expressly incorporated the Guide into government-wide "Principles for the Utilization and Care of

Vertebrate Animals Used in Testing, Research and Training." C.A. App. 263. In short, as characterized by NAS itself, "*[t]he Guide serves as the basis for policy on research animal care and use for all federal agencies*," and is heavily relied on by "regulators in development of federal standards on research animal care and use." NAS, *Organization and Members* 227 (1994) (emphasis added) (C.A. App. 73).

The Guide was first published in 1963 and has been revised on several occasions over the past three decades. Each such revision has been undertaken with federal funds, has identified a federal agency as the sponsor of the report, and has been prepared by an advisory committee of experts empaneled for the government by a subdivision of NAS/NRC known as the Institute of Laboratory Animal Resources.

The most recent such revision — prior to the one at issue here — was drafted in 1985 by fourteen members of the Committee on Care and Use of Laboratory Animals. *See Guide* (1985 revision) (C.A. App. 263). That edition is expressly identified on its cover as an "NIH Publication," and states that it was prepared by the NAS committee "*for* the National Institutes of Health" with federal funds. C.A. App. 217, 218 (emphasis added).

c. Following the 1985 revision of the Guide, there were significant developments involving the use of animals in research, including amendments to the Animal Welfare Act. *See* Pub. L. 99-198, Title XVII, § 1751, 99 Stat. 1645. Consequently, in November 1991, NAS officials met with representatives of federal agencies which had previously relied on the Guide, including "past sponsors" — *i.e.*, NIH and the Public Health Service — as well as the "Agriculture [Department] and others who look to the Guide for guidance in their animal care and use programs." C.A. App. 665.

At that meeting, NAS and federal officials agreed that a new version of the Guide "should be revised in the near future" by a committee of experts. C.A. App. 64. As summarized by an NAS official, a "key factor" in this decision was that the Guide "prepared by an expert committee of scientists [was] available when the law and regulations were written," and should continue to "be available" as federal decisionmakers revised their policies on care and use of animals in research. C.A. App. 137.

With regard to the composition of the Guide Committee, the federal and NAS officials discussed the general "constituencies to be represented," agreeing that

> *a balance of disciplines similar to that used for the last revision (1985) would be satisfactory.* That committee was comprised of laboratory animal veterinarians, research users (mostly Ph.Ds and M.D.s in several areas), and one high level academic administrator (M.D.).

C.A. App. 66 (emphasis added). The federal and NAS officials even discussed the "content" of the recommendations to be devised by the Committee and the "initial charge to the revision committee" regarding the specific issue of appropriate cage sizes for laboratory animals. C.A. App. 65; *see id.* ("revision committee will likely experience considerable pressure to modify [i.e., enlarge] cage sizes as it did during the last revision").

In October 1992, NAS submitted a formal "proposal" to NIH for funding of the Guide revision. To avoid the "difficulty of preparing and administering contracts," C.A. App. 384 — *e.g.*, being forced to subject the proposal to competitive bidding — NAS styled its proposal as a "grant" request, which is not subject to the federal acquisition regulations that ordinarily apply to federal contracts. *See* 48 C.F.R. § 2501 *et*

seq. The grant application, which sought more than $ 400,000 in federal funds, provided that an "NRC-appointed committee composed of 15 members will meet approximately five times, and develop the 7th Edition of the Guide," and that the Committee's recommendations to federal agencies will "assure consistency with major changes in animal welfare regulations, consider developing guidelines for the use of farm animals in research, and recommend those animal care issues in which research is needed to provide definitive recommendations." C.A. App. 114-15.

In August 1993, NIH formally approved NAS's proposal and agreed to pay $ 180,000 for the first year of the project. C.A. App. 141. The following year, NIH awarded a "continuation grant," also for $ 180,000. C.A. App. 149. Other federal agencies, including USDA, contributed additional funding. C.A. App. 422-47.

d. One month after the grant was awarded, NAS asked fifteen individuals to become members of the "Committee to Revise the Guide for the Care and Use of Laboratory Animals," which, the prospective members were told, "*serves as the basis for policy on research animal care and use for all federal agencies,*" and is used "by regulators in development of federal standards on research animal care and use." C.A. App. 143 (emphasis added). The majority of Committee members are "scientists of national stature who use animals in their research," — *i.e.*, they are individuals who must comply with the very federal standards they were being asked to develop. C.A. App. 117.

In January 1994, NAS informed the public that the "National Institutes of Health and other federal sponsors *have asked that a committee be appointed to revise the Guide* . . .." C.A. App. 69 (emphasis added). Nevertheless, despite requests by respondents that the Committee's meetings be open to the

public, the Committee denied access to the meetings at which it deliberated on, and devised, its recommendations for the care and use of animals in research — meetings which, if the Committee were subject to FACA, would have been open to the public under section 10(a)(1) of the Act.

The federal government and NAS also refused to provide respondents and other members of the public with transcripts or minutes of Committee meetings, or with other "record[s] prepared for or by" the Committee, as required by section 10(b) of FACA. Accordingly, respondents filed this lawsuit against HHS and other federal agencies which use the Guide. Respondents sought declaratory and injunctive relief on the grounds that the Committee was subject to FACA, either because it was "established" or because it was "utilized" by federal agencies. 5 U.S.C. App. II § 3(2).

5. Proceedings Below

After their FACA claim was rejected in the district court, respondents appealed. A panel of the Court of Appeals (Judges Silberman, Ginsburg, and Sentelle) reversed, ruling unanimously that "under *Public Citizen*, the Guide Committee must be regarded as utilized by HHS because it relies on the Committee's work product and because it was formed by the NAS, a quasi-public entity." Petitioner's Appendix ("Pet. App.") at 14a.[3]

Writing for the Court, Judge Silberman first noted that the Committee is plainly covered by the ordinary meaning of the word "utilized," since "[i]t is quite obvious that the Committee was and is *used* by HHS . . .." Pet. App. at 5a (emphasis in original). Judge Silberman further explained that,

[3] In the Court of Appeals, respondents did not press their argument that the Committee was also "established" by federal agencies.

although the "term 'utilized' was given a very narrow interpretation by the Supreme Court in *Public Citizen*," the "Court indicated quite explicitly in an extensive discussion . . . that advisory committees formed by the NAS were precisely the sort of advisory committees that would be covered by the Act." *Id.* In particular, he highlighted the language from *Public Citizen* that "NAS Committees were the 'paradigmatic example'" of "utilized" committees because the "NAS is a 'quasi-public organization in receipt of public funds.'" Pet. App. at 7a, quoting *Public Citizen*, 491 U.S. at 460.

In addition to noting the "repeated[]" references to NAS committees in *Public Citizen*, Pet. App. at 7a, the D.C. Circuit reasoned that this Court's controlling *test* for "utilized" committees applies squarely to the Guide Revision Committee. Thus, in response to defendants' contention that the references to NAS were only dicta, the Court of Appeals stressed that "[w]hat is part of the holding" in *Public Citizen*

> is its conclusion that by employing the term 'utilized,' in addition to 'established,' Congress had in mind *an extension of the Act's coverage to include the offspring of 'quasi-public' organizations 'permeated by the Federal government.'* After all, that is the only sort of advisory committee the Court recognized as reached by the term 'utilized.' Unfortunately for appellees, *they are not able to point to any other organization that fits this category more readily.*

Pet. App. at 10a (emphasis added).

The Court of Appeals denied the government's and NAS's petitions for rehearing and suggestions for rehearing *en banc*. In concurring in the denial of *en banc* review, Judge Silberman emphasized that *Public Citizen*'s discussion of committees created by quasi-public organizations for federal agencies

constitutes the "core logic of the Court's effort to determine the meaning of the word 'utilize' as used in FACA." Pet. App. at 40a. While NAS has petitioned for review here, the federal government has declined to do so.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' HOLDING AFFECTS ONLY ONE ORGANIZATION AND THAT ORGANIZATION HAS NOT EVEN ATTEMPTED TO COMPLY WITH FACA BEFORE SEEKING REVIEW IN THIS COURT.

NAS suggests several reasons why the Court should grant review. Before rebutting those arguments, however, it is important to stress why this is a particularly inappropriate case for review by this Court.

To begin with, NAS acknowledges that there is no conflict in the Circuits either regarding FACA's applicability to NAS committees or, more important, with respect to the general question of how the word "utilized" should be construed. Pet. at 9. Thus, if review were granted, the Court would, in essence, be deciding on the legal status under FACA of committees formed for the use of federal agencies by only *one* entity — NAS.[4]

Therefore, NAS's assertion that the ruling below "will lead to extensive and burdensome litigation on the status of many different organizations and their relationship to the government," Pet. at 16, is not only wrong but misses the whole point of the D.C. Circuit's ruling. The Court of Appeals' determination that NAS is a "quasi-public" entity *for FACA*

[4] In addition, not all NAS committees are affected by the D.C. Circuit's ruling. NAS committees formed for Congress, for state or local agencies, or for private organizations are unaffected by the decision.

purposes was based on a narrow "set of qualities" that *this* Court "thought critical" in *Public Citizen* — a "set of qualities" that virtually defines NAS and NAS alone. Pet. App. at 10a.

Thus, under *Public Citizen* and the ruling below, a "quasi-public" organization for FACA purposes is one which "was formed *'for the explicit purpose of furnishing advice to the Government.'* " Pet. App. at 10a, quoting 491 U.S. at 460 n. 11 (emphasis added). NAS meets this definition because, as noted above, it is *mandated* by Congress to respond to requests by federal agencies for advice and recommendations. *See* 36 U.S.C. § 253. Tellingly, although pressed by both respondents and the Court of Appeals, NAS and the government have failed to point to a single *"purely private"* organization which is, or could be, subject to a Congressionally-imposed duty to furnish advice at the government's request. 491 U.S. at 460 (emphasis added).

In other words, it is precisely this "unique" and "special" role played by NAS — and trumpeted by it in its own publications and in its petition to this Court, *see supra* at 5-7 — that sets it apart from other organizations whose status under FACA is simply not implicated by the decision below. At core, at least as resolved by the D.C. Circuit, this case is essentially about one organization's status under one open government statute. Especially in light of the narrow nature of the decision below, NAS cannot demonstrate that review is necessary to resolve an important question of federal law.

Moreover, even if this case had more widespread legal significance, NAS's petition greatly overstates the difficulty of compliance with FACA's procedural requirements. Indeed, NAS and the federal agencies which rely on it have yet to *attempt* to comply with FACA's public access requirements —

requirements with which hundreds of other influential expert advisory committees manage to comply each year with little difficulty. *See* President's FACA Report at 1 (indicating that *948* advisory committees complied with FACA during fiscal year 1995).

Thus, while NAS's petition is filled with alarmist rhetoric about the evils that will occur if "NAS were forced to open its deliberations," Pet. at 22, that stance is based entirely on self-serving surmise and supposition, not on any concrete effort to actually comply with FACA's elementary procedures. Moreover, as the district court noted in this case in the course of making a factual finding that NAS "would suffer minimal harm at most" if the Committee at issue were required to comply with FACA:

> Decision-making bodies, whether located in the public or private sector, invariably object to the presence of outsiders and complain about restrictions on open discussion and uninhibited statements of views. *In practice those fears are rarely well founded.* There is nothing in the record to suggest that confidential or proprietary information will be disclosed if plaintiffs attend . . . *In short, the Court sees at most some minor logistical inconvenience to be suffered by the defendants, and here I am referring to perhaps making arrangements to ensure adequate seating.*

C.A. App. 331 (emphasis added). The district court further found that the "public interest would be furthered by the public's attendance at and observation of the committee's analysis and discussion and consideration of these very important issues," and, moreover, that "public scrutiny is particularly important and gives credibility and legitimacy to the ultimate conclusions which will be reached by the Guide Revi-

sion Committee." C.A. App. 330, 332.[5]

In light of those findings, NAS should at least attempt to comply with FACA before it seeks review in this Court on the grounds that such compliance will invariably harm the "*government's* ability to obtain valuable, independent advice from NAS," Pet. at 21 (emphasis added) — particularly when the government itself has not sought review of the D.C. Circuit's ruling on that or any other basis. Indeed, contrary to NAS's petition, the President has recently reaffirmed FACA's basic assumption that a modicum of public access and accountability makes governmental advisory bodies *more*, rather than less, valuable to federal agencies and the public. *See* President's FACA Report at 1.[6]

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[5] The district court made those findings in the course of ruling on plaintiffs' motion for a preliminary injunction. While concluding that a balancing of the equities and the public interest favored the issuance of an injunction, the district court denied that relief solely because of its "reluctant[]" conclusion that plaintiffs were not likely to prevail on the merits. C.A. App. 332.

[6] NAS is also wrong in suggesting that "[a]ll future cases raising the applicability of FACA to specific NAS committees" will necessarily be brought in the District of Columbia, thus foreclosing any possibility of a Circuit conflict. Pet. at 9. Organizations and individuals who reside elsewhere may well, for reasons of convenience and cost, bring suit in other Circuits against federal officials who rely on NAS committees, as they would be permitted to do under the relevant venue provision, 28 U.S.C. § 1391(e).

II. THE DECISION BELOW FAITHFULLY FOLLOWED THIS COURT'S RULING IN *PUBLIC CITIZEN* AND NAS HAS PROVIDED NO COMPELLING REASON WHY THAT RULING SHOULD BE DISREGARDED.

NAS devotes most of its petition to arguing why, in its view, the Court of Appeals was wrong on the merits, rather than explaining why a case of statutory construction affecting one organization is sufficiently significant to warrant this Court's review. Pet. at 9-16. In any event, NAS's attack on the ruling below is utterly misplaced, since the D.C. Circuit merely applied this Court's own construction of the word "utilized" in *Public Citizen*.

As noted above, *Public Citizen* engaged in a detailed "consideration of FACA's purposes and origins," and paid "[c]lose attention to FACA's history" in an effort to "ascertain the intended scope of the term 'utilize'" — the precise legal question at issue here. 491 U.S. at 455, 456. Based on that "careful review," *id.* at 464, the Court concluded that a committee is "utilized" when it is "*formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies* as well as 'by' such agencies themselves." *Id.* at 462 (emphasis added).

Moreover, at each step of its detailed analysis of the "indicators of Congressional intent," 491 U.S. at 455, the Court expressly referred to NAS committees to define the very characteristics of "utilized" advisory bodies that were *not* shared by the ABA Committee. For example, the Court stated that:

> — "*the [1970 House] Report's paradigmatic example of a committee "utilized" by an agency* for purposes of Executive Order No. 11007 was an advisory committee established by a quasi-public organization

in receipt of public funds, such as the National Academy of Sciences.'' *Id.* at 460 (emphasis added);

— '' '*The National Academy of Sciences was created by Congress as a semi-private organization for the explicit purpose of furnishing advice to the Government.* This is done by the use of advisory committees.' '' *Id.* at 460 n. 11, quoting 1970 House Report (emphasis added);

— ''*the examples the Senate Report offers [including] . . . 'advisory councils to the National Institutes of Health and committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official,' ibid.* — are limited to groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status.'' 491 U.S. at 461, quoting S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972) (emphasis added);

— ''The phrase 'or utilized' therefore appears to have been added simply to clarify that *FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves.*'' 491 U.S. at 462 (emphasis added);

— ''Read in this way, the term 'utilized' would meet the concerns of the authors of House Report No. 91-1731 that advisory committees covered by Executive Order No. 11007, because they were '*utilized by a department or agency in the same manner as a Government-formed advisory committee' — such as the groups organized by the National Academy of Sciences and its affiliates which the Report discussed — would be subject to FACA's requirements.*'' *Id.* at 462-63 (emphasis added).

As these passages demonstrate, this Court *defined* "utilized" committees as those formed for the use of a federal agency "by some semi-private entity the Federal Government helped bring into being." *Id.* at 463. Since NAS is indeed the "paradigmatic" example of such a "semi-private entity," *id.* at 460 — as this Court used that term in *Public Citizen* — the D.C. Circuit's decision was the only possible outcome faithful to this Court's controlling statutory construction.

Put differently, this Court cannot reverse the Court of Appeals' decision without adopting a construction of the word "utilized" which departs sharply from the interpretive approach taken in *Public Citizen* and which is at odds with the Court's own prior reading of FACA's legislative history and purposes. Indeed, NAS appears to recognize as much, since it suggests that the Court engage in exactly the form of statutory analysis which this Court declined to pursue in *Public Citizen* — *i.e.*, that the Court accord the word "utilize" its "plain meaning" and that "[i]t is this meaning that should guide the interpretation of the statute." Pet. at 10; *compare Public Citizen*, 491 U.S. at 453 (declining to adopt a "straightforward reading" of the word "utilize").

Other than its disagreement with the outcome in this particular case, NAS has suggested no "compelling justification" for the Court to revisit and overrule its prior construction of FACA. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991), quoting *Paterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The Court has repeatedly stressed that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.*

But even if the Court were to jettison *Public Citizen*'s narrow reading of "utilized" in favor of the more expansive, "plain meaning of the statutory language," Pet. at 10, that would hardly change the outcome here. Indeed, NAS acknowledges that the word "utilize" is "synonymous with the verb 'use,'" Pet. at 10, quoting *Webster's Third New International Dictionary* 2525 (1993), and, as the D.C. Circuit observed, "[i]t is quite obvious that the Committee was and is *used* by HHS." Pet. App. at 5a (emphasis in original). Moreover, any notion that the federal defendants did not "use" the Committee is belied by NAS's own press release, issued at the time of the Committee's formation, which specifically announced that "*federal sponsors have asked that a committee be appointed* to review the *Guide for the Care and Use of Laboratory Animals (Guide)*." C.A. App. 69 (emphasis added).[7]

In addition, even if the Court were "examining the plain meaning of the statutory language" afresh, Pet. at 10, it would focus on the critical fact that FACA *expressly* excludes several specific advisory bodies from the statute's requirements, including the "Commission on Government Procurement," "any committee which is composed wholly of full-time officers or employees of the Federal Government," committees "utilized by [] the Central Intelligence Agency," and committees "utilized by [] the Federal Reserve System." 5 U.S.C. App. II §§ 3(2), 4(b). But, although Congress certainly knew

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[7] In contrast, NAS's tortuous reasoning that the words "utilize" or "use" are somehow synonymous with "actual control" of the advisory body, Pet. at 10, has no basis in the statutory language, which merely requires that an agency "utiliz[e]" a committee "*in the interest of obtaining advice or recommendations*," 5 U.S.C. App. II § 3(2) — which is precisely what occurred here. Moreover, under NAS's anomalous approach, no advisory committee would ever be "utilized" because FACA forbids federal agencies from *controlling* advisory committee deliberations precisely so that the committees can produce independent advice. *See supra* at 3.

how to exempt specific advisory committees from the statute's requirements, it did not do so for NAS committees — a fact which, under "cardinal rule[s] of statutory construction," Pet. at 9, overwhelmingly supports the conclusion that no such exception was intended. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 109 (1980) ("If Congress had intended to exclude FOIA disclosures from § 6(b)(1) [of the Consumer Product Safety Act] it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.").

There is likewise no substance to NAS's assertion that *Public Citizen*'s analysis of FACA's legislative history overlooked crucial materials. Pet. at 11-14. In fact, throughout this lengthy litigation, NAS has not cited even one sentence regarding NAS in a House, Senate, or Conference report which *Public Citizen* did not address in its extensive discussion of FACA's background and purposes.[8]

Instead, as below, defendants can cite only to an isolated comment on the House floor which would be entitled to little, if any, weight under any circumstances. *See Bath Iron Workers v. Director, Office of Workers' Compensation Programs*, 506 U.S. 153, 166 (1993) ("we give no weight to a single reference

[8] As noted above, *Public Citizen's* analysis of FACA's legislative history was based largely on an *amicus* brief. *See supra* at n. 2. That brief argued at length that the phrase "or utilized" was intended to cover NAS committees, but it also specifically informed the Court about a district court opinion which had read FACA's legislative history differently to reach the opposite "hold[ing] that a[n] NAS committee was *not* subject to FACA . . .." Pet. App. at 9a (emphasis in original), citing *Lombardo v. Handler*, 397 F. Supp. 792, 799 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977). Therefore, contrary to NAS's assertion, Pet. at 14, the D.C. Circuit was plainly justified in "presum[ing]" that this Court was aware of all of the pertinent case law and legislative history when it adopted its controlling construction of "or utilized." Pet. App. at 9a.

by a single Senator during floor debate''). In fact, the statement of Rep. Hollifield quoted by NAS is far more obscure than the report language cited in *Public Citizen*, and it certainly does not say that NAS *committees* could avoid FACA's requirements — an exemption which appears nowhere in the statute itself.

Rather, the most that this remark signifies is that one member of Congress did not believe that NAS *itself* would be subject to FACA. *See* 118 Cong. Rec. 31421 (1972). Crucially, however, *Public Citizen* does not say, nor have respondents ever argued, that *NAS* is an advisory committee that is subject to FACA whenever it enters into an arrangement with a federal agency. Rather, respondents are relying on the far narrower proposition announced by this Court — and not undercut by any legislative history cited by NAS — that, when NAS forms an advisory committee ''for'' a federal agency, that committee is ''utilized'' within the meaning of FACA. *See* 491 U.S. at 462.

This analysis also answers NAS's assertion that the Committee at issue is not covered by FACA because it was ''established pursuant to a contractual relationship . . ..'' Pet. at 12-13. FACA itself alludes to no such exception, and even the legislative history cited by the Academy in no way suggests that committees formed by government contractors *for* federal agencies are somehow immune from FACA's requirements; indeed, if they were, then *every* advisory committee could circumvent the statute merely by signing a ''contract'' with the agency. And, even if such a gaping loophole in the statute had been created, it has nothing to do with this case, in which NAS purposefully avoided the competitive bidding and other requirements applicable to government contracts. *See supra* at 10.

III. NAS HAS PROFFERED NO OTHER PERSUASIVE REASON FOR THIS COURT TO GRANT REVIEW.

None of the additional reasons NAS urges as a basis for review has any merit. First, NAS argues that it would not be "fair" if the Court were to deny review because NAS has not had an "opportunity to litigate its status under FACA." *Id.* at 1617. It is certainly debatable whether NAS — many of whose committees fall squarely within the ordinary meaning of the word "utilize" — had ample reason to at least file an *amicus* brief in *Public Citizen*, a case whose outcome "depended entirely on the meaning" of that "one word." Pet. App. at 6a.

In any event, NAS offers no pertinent authority for the novel suggestion that a party cannot be affected by this Court's (or, for that matter, any court's) construction of a federal statute unless the party participated directly in the litigation in which that construction was adopted. To the contrary, virtually every case in which the Court interprets a federal law affects organizations and persons who are not before the Court and, indeed, organizations and persons who may have no awareness of the case whatsoever.

Moreover, NAS has now had a full and fair opportunity to argue in the lower courts that this Court's *test* for "utilized" committees — *i.e.*, that such entities include committees created by a "quasi-public" organization "for" a federal agency — does not apply to the Committee at issue. The fact that NAS *lost* because the Committee does indeed have the precise characteristics which *Public Citizen* identified as pertinent to application of FACA hardly means that NAS has been deprived of its "basic right to be heard." Pet. at 20.

Second, NAS stresses the enormous influence that its committees have had on a "myriad" of issues of "national importance." Pet. at 8, 20-22. But, as recognized by the district court here, *see supra* at 16, this simply highlights the importance of ***ensuring*** that NAS committees comply with FACA's provisions for public access and accountability.

In this case, for example, federal agencies largely delegated to an NAS committee their authority under federal law to promulgate binding federal standards for the treatment of animals in laboratories throughout the nation. *See* Pet. App. at 2a (noting that HHS regulations "actually require that institutions funded by [NIH] follow the most recent version of the Guide"). Yet, despite the Committee's vast influence on government policy — and its expenditure of nearly $400,000 in public funds — the public was denied the opportunity to see, through access to meetings and documents, ***how*** the committee arrived at these regulatory standards.

In short, this surely *is* the "paradigmatic" FACA arrangement, not only because this Court said so, but because it implicates the core purposes of FACA. Conversely, defendants' policy argument that applying FACA to NAS committees will impair the government's ability to obtain "independent advice" from NAS, Pet. at 21, flies in the face of FACA itself, which, as noted above, demands that agencies ***not*** "inappropriately influence[]" advisory committees, and instead requires that any recommendations be the "***result of the advisory committee's independent judgment.***" 5 U.S.C. App. II § 5(b)(3) (emphasis added). Plainly, if such bodies as the Advisory Committee on Human Radiation Experiments, the Defense Base Closure and Realignment Commission, and the Bipartisan Commission on Entitlement Reform could manage to provide valuable advice while complying with FACA's openness requirements, *see* President's FACA Report at 4, there is no

reason why an NAS Committee which advises federal agencies on the treatment of laboratory animals could not do so as well.

Nor is there any substance to NAS's assertion that FACA compliance would compel NAS to "relinquish control of its own committees to Government officials." Pet. at 22. As made clear in *Public Citizen*, NAS may continue to form and manage committees "for" federal agencies, so long as they meet the minimum public access and accountability requirements with which thousands of other influential advisory committees have complied.[9]

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[9] Contrary to NAS's warnings, there is no evidence that the panel ruling is having an "adverse impact" on NAS's operations. Pet. at 21. So far as respondents are aware, only one lawsuit has been filed since the Court of Appeals' ruling, and that case merely demonstrates the ability of district court judges to craft suitable relief for FACA violations.

In *Natural Resources Defense Council v. Curtis*, Civ. No. 97-308 (PLF) (D.D.C. Mar. 5, 1997), the plaintiffs requested preliminary injunctive relief with regard to an NAS committee formed to advise the Department of Energy on the start-up of a billion dollar facility. That committee largely met in secret and had members who had received compensation from the national laborory where the project would be built. Finding that there is a "strong public interest in the enforcement of FACA [and] in assuring that the government abides by the disclosure rules contained in the statute," the district court enjoined DOE from "utilizing" the committee's work. *Id.* at 3. At the same time, to ensure that its injunction did not impair any First Amendment rights of the committee members, the Court refused to enjoin NAS from releasing the report, meeting or otherwise continuing to function.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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